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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KATHLEEN SOMMER, Plaintiff and Appellant, v. GEORGINE F. BRAVE et al., Defendants and Respondents.	D058476 (Super. Ct. No. 37-2009-00099705-CU-PN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Reversed.

Plaintiff and appellant Kathleen Sommer brought a legal malpractice action against defendant Georgine F. Brave and her firm, Brave, Weber & Mack, APC (together, Brave). This appeal arises from a defense summary judgment granted on the ground that the action was barred by the limitations period established by Code of Civil Procedure section 340.6, subdivision (a)(1) (one-year statute of limitations, tolled until

actual injury sustained; Code Civ. Proc., § 437c; undesignated statutory references will be to this code).

Brave's legal services were rendered in 2006 and 2007, when she represented Sommer's mother, Gloria Moser (Gloria), in a real property and family law transaction involving transfer of title of Gloria's 50 percent interest in a condominium (the property) that Gloria shared with her husband, Bill Moser (Moser). It is not disputed that Gloria intended that her daughter, Sommer, receive her entire interest in the property, by way of a related trust that was prepared by different counsel. After Gloria died in January 2007, numerous disputes about ownership of the property between Sommer and Moser ensued, and Sommer repeatedly asked Gloria's attorneys about the transfer of her interests. Sommer also communicated in 2007 with Moser's attorney and in 2008 with a friend of Moser, about her claim to the property.

However, it was not until the fall of 2008 that Sommer retained her own attorney, not until May 2009 that she filed a petition to settle Gloria's assets in probate court, and not until April 2010 that the matter with Moser was formally settled and she took compensation for a 25 percent interest in the property. Brave thus argued that Sommer's October 2009 complaint was untimely filed, and the trial court agreed, granting summary judgment under section 340.6, subdivision (a). However, the trial court did not reach any alternate arguments about whether Brave had breached the applicable standard of care through the manner in which the quitclaim deed transaction was structured, or whether there was any proximate causation of injury to Sommer.

The limitations period of section 340.6 for legal malpractice actions begins to run "after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." (§ 340.6, subd. (a).) Section 340.6, subdivision (a)(1) further provides that the applicable statutory time period does not begin to run until the plaintiff has "sustained actual injury." (*Jordache Enterprises v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749-751 (*Jordache*) [principles of tolling apply to evaluate when the limitations period is triggered by the sustaining of harm or "actual injury."].)

Normally, where it is disputed when a malpractice plaintiff has sustained actual injury and whether the harm was a consequence of the defendant attorney's negligence, a question of fact is presented. (*Adams v. Paul* (1995) 11 Cal.4th 583, 588-591 (*Adams*).) However, where the facts are undisputed, "the trial court can resolve the question as a matter of law in accordance with the general principles governing summary judgment." (*Id.* at p. 591.)

As we will explain, this record reveals that triable issues of material fact remain for resolution about whether and when Sommer sustained actual injury from the manner in which Brave prepared the transactional documents, causing Sommer to "receive" a lesser interest than Gloria intended to give her. Because of our application of limitations rules to this record, we need not discuss any issues about the alleged breach of professional duty or causation. We reverse the summary judgment for further appropriate proceedings in the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

A. Legal Representation of Gloria by Brave and Others

In late 2006, Gloria was living with her husband Moser in the property, which they owned in joint tenancy, and Gloria was ill with terminal cancer. She desired to leave her share of the property to Sommer, her daughter from another marriage. Stepfather Moser did not agree with this plan.

To address the property interest dispute, Gloria retained Brave to file a petition for legal separation from Moser, and to prepare documents changing title of the property from joint tenancy to a tenancy in common. As part of the transaction, Gloria also hired a trust attorney, Karen Ladner.[1]

Brave prepared and Gloria signed a quitclaim deed and notice of preliminary transfer of title, designed to sever the joint tenancy between Moser and Gloria, and to create instead a tenancy in common, to enable Gloria to pass her half on to Sommer. (Civ. Code, § 683.2, subd. (a) [joint tenant may sever joint tenancy interest in real property without consent of other joint tenants by meeting certain requirements of writing and recording].) The deed expressly provided that Gloria, as a joint tenant, quitclaimed her 50 percent interest to: "William H. Moser and Gloria Moser, *Husband and Wife, as Tenants in Common* . . . ." (Italics added; if Gloria had deeded it to herself alone, the result would likely have been different, although Brave still disputes this.) Sommer

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1 Ladner was originally named as a defendant in this malpractice action, but she has settled and been dismissed from it.

assisted her mother by having the deed recorded at the San Diego County Recorder's office on December 5, 2006, and she kept a copy.

Next, trust attorney Ladner prepared a trust to allow Gloria's assets eventually to pass to Sommer upon Gloria's death. Regarding the property, Ladner prepared a second quitclaim deed to convey Gloria's interest in it to her trust, and it was recorded on December 27, 2006.

Gloria died on January 4, 2007. Ladner prepared a third quitclaim deed, recorded on January 25, 2007, conveying the property interest from Gloria's trust to Sommer, who was trustee and also the beneficiary of the trust.

As of 2007, Sommer believed that she and her daughters were still Moser's heirs, as in his 2005 will, but Moser then told her she would not get any of the property, or alternatively, that he believed his interest was now 75 percent. After some of Gloria's relatives alarmed Moser by coming to the property in early 2007, Moser changed the locks and did not give a key to Sommer. Moser raised the idea that Gloria's change of title might not have been valid, since she passed away so soon thereafter and might not have been competent to make transactions.[2]

In January 2007, Moser's first attorney, Stein, told Sommer that she may not own half the property and the matter should go to probate. Over the rest of the year and until March 2008, Sommer sent various e-mails to Brave and to Ladner asking why he would say that, as she did not understand why the recorded title in the trust and in her name

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2 No such incapacity theory was pursued in the trial court or this court.

could be disputed. During 2006-2008, Sommer sometimes checked the status of title at the recorder's office, to see if Moser had changed his will or trust. She continued to ask her mother's attorneys why Moser was asserting he owned the entire property and whether he could change the recorded status unilaterally. In February of 2007, Ladner told Sommer that if the deed prepared by Brave was accurately prepared from the most current prior deed, it should be fine, although Ladner said she had not seen the previous deed.

Sommer learned in September 2008 that Moser had written a new will and recorded property transactions for his own newly created trust, under which she was not a beneficiary. In October 2008, Sommer retained Beth Atuatasi (her probate attorney), who communicated with Moser and his attorneys about the property interests. In January 2009, Moser's attorney Michael Hickman wrote the probate attorney notifying her that at most, he believed Gloria's trust held only a 25 percent interest in the property, and Sommer's claim to it would be subject to substantial offsets. There were also disputes about promissory notes and about other property in which Sommer was claiming an interest.

In early 2009, Sommer's probate counsel asked Brave for a declaration to explain it had been Gloria's intent to sever the joint tenancy of the property, and change it to tenancy in common with Moser. Brave required Sommer to execute a retainer agreement

for preparation of such a declaration, and the declaration was used in support of the probate petition.[3]

Sommer's probate attorney filed the petition in May 2009, alleging disputes about ownership of the property and other assets. In April 2010, Sommer and Moser entered into a written settlement of their disputes in the probate action, but without any formal ruling or court findings being made regarding the state of title or ownership of the property. Under the settlement, Sommer accepted payment from Moser of $250,000 for all interests, of which she designated $120,000 as representing the lost 25 percent share of the property (worth $480,000 total). Other payments by Moser under the settlement agreement represented other disputed assets of Gloria.

B. Complaint Filed; Summary Judgment Proceedings

On October 5, 2009, while her probate case was still pending, Sommer filed her action for professional negligence damages against Brave and Ladner, alleging the quitclaim deeds and trust they had prepared were defective and caused damage to Sommer. She pled discovery of her injury no earlier than October 31, 2008.[4]

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[3] There are no contentions here about any continuing professional representation by Brave of Sommer that would toll any applicable limitations period. (§ 340.6, subd. (a)(2).)

[4] In her reply brief on appeal, Sommer now represents that her discovery of harm did not occur until the January 2009 letter from Moser's attorney, and her complaint factual allegations about discovery were wrong. We need not resolve any factual disputes about when any actual injury occurred or was discovered, as further explained in the discussion portion of this opinion, and leave any potential pleadings amendment requests to the trial court's discretion.

In September 2010, Brave moved for summary judgment, asserting (1) the applicable one-year statute of limitations (§ 340.6, subd. (a)) barred the action, and (2) Sommer was unable to prove any breach of a professional duty or causation of harm. Brave contended it could be determined as a matter of law that she had a meritorious affirmative defense of limitations, because Sommer had discovered, or should have discovered, the facts constituting any wrongful act or omission more than one year before the complaint was filed. Specifically, Brave contended Sommer knew or should have known of the relevant facts as early as January 31, 2007, when Moser's first attorney (Stein) rejected Sommer's position about her 50 percent ownership, or by March 14, 2008, when Moser's friend told Sommer that Moser thought she was trying to take his property and the change by her mother was probably invalid.

Brave relied on Civil Code section 1207 to contend that when the quitclaim deed was prepared and recorded in December 2006, Sommer was placed on notice of the status of the property and she must have reasonably understood that the deed was dispositive of her interests, and that any type of problem with the deed might adversely affect her interests.[5] (Civ. Code, § 683.2 [allowing severance of joint tenancy between spouses].)

Sommer opposed the motion on the ground that the applicable statute of limitations had not run, because she was not placed on notice of any facts about the role

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[5] Civil Code section 1207 provides that the recording of any instrument affecting title to real property amounts to constructive notice of title after a one-year period has passed, even if the execution of the instrument was defective in some way. (See pt. II.B, *post*.)

that legal malpractice by Brave might have played in the property dispute until approximately October 2008, when she was compelled to retain her probate counsel.[6] Alternatively, she argued she did not realize she was injured until January 2009, when Moser's next attorney rejected her claim. In reply papers, Brave raised evidentiary objections to portions of Sommer's declaration.

C. Ruling

After argument, the trial court issued a ruling in favor of Brave, determining that the action filed October 5, 2009 was time-barred because Sommer discovered, or through the use of reasonable diligence should have discovered, the facts constituting Brave's alleged malpractice no later than January 31, 2007, when Moser's first attorney told Sommer she may not own half of the property. Sommer knew her ownership interest in the property was predicated on the quitclaim deed prepared by Brave. Alternatively, by at least March 2008, Sommer knew that Moser was disputing her ownership interest in the property, based upon questions about the validity of the December 2006 quitclaim

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6 Sommer, as an intended beneficiary of the professional services, is pursuing negligence remedies against Brave, who was employed by Gloria. (*Heyer v. Flaig* (1969) 70 Cal.2d 223, disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617 (*Laird*) [under *Heyer*, an intended beneficiary of the client could sue the client's attorney for professional negligence in preparing a will, when the beneficiary was intended to have a right to inherit upon the death of the client, but could not do so due to the negligence].) Brave continues to dispute any malpractice liability based on the quitclaim deed terms, or says that in any case, there have been no dispositive judicial findings that it was defective nor that Sommer received less than she should have received (when the matter was settled in the probate court).

deed. The court ruled that Sommer was contradicting her own pleading (Oct. 2008 discovery) by claiming late discovery (Jan. 2009) of any malpractice injury.

The trial court relied on Civil Code section 1207 as providing constructive notice to Sommer of the contents of the quitclaim deed, notwithstanding any defects in the execution of the instrument. Off and on through 2006-2008, Sommer spent time researching title at the county recorder's office. The court ruled she had not provided sufficient evidence to raise a triable issue about any defective state of her knowledge about the property interest and about Brave's role in the transaction.

In its ruling, the trial court sustained several evidentiary objections lodged by Brave in reply to Sommer's opposition papers, particularly portions of Sommer's declaration (speculation, legal conclusions, lack of foundation).[7] Brave's motion for summary judgment was granted on limitations grounds, and the court did not rule upon any issues about breach of professional duty in preparing the deed or causation of harm.

Sommer appeals the judgment.

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[7] These evidentiary rulings are not seriously disputed in this appeal, and Sommer's declaration and the record as a whole contains enough admissible evidence to address the appropriate legal issues about the application of limitations rules to her allegations. Although Sommer relies in some way upon section 437c, subdivision (e) to seek reversal because she was supposedly entitled to a discretionary denial of summary judgment (where a case turns upon an individual's state of mind as the key material fact sought to be proved), it is unnecessary to discuss that issue on appeal. This record requires a de novo approach for analyzing the set of facts currently established.

DISCUSSION

Under section 340.6, subdivision (a)(1), the date of actual injury occurs when a right, remedy or interest is lost. (*Jordache*, *supra*, 18 Cal.4th at p. 750; see 3 Legal Malpractice (Mallen & Smith, 2012 ed.) § 23:12, pp. 429-437 (Mallen & Smith).) We inquire whether the trial court correctly found that only one reasonable inference could be drawn from this essentially undisputed set of facts, that Sommer must reasonably be deemed to have learned of all facts essential to her claims against Brave earlier than one year before the complaint was filed October 5, 2009. We examine the record to determine the point or points at which Sommer arguably sustained actual injury or loss of her property rights due to legal malpractice, as alleged.

I

APPLICABLE STANDARDS

A. Standard of Review

Section 437c provides for a motion for summary judgment to be granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) "[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action

or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' " (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849; § 437c, subd. (p)(2).)

We review the court's summary judgment ruling de novo, "considering all of the evidence the parties offered in connection with the motion . . . and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) "[S]ummary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (§ 437c, subd. (c).)

In deciding if the plaintiff has demonstrated the existence of a triable issue of fact, the courts do not "weigh the evidence in the manner of a fact finder to determine whose version is more likely true. [Citations.] Nor may the trial court grant summary judgment based on the court's evaluation of credibility. [Citations.] [¶] The court must consider not only the bare evidence, but also the reasonable inferences deducible from the evidence [citation], and determine whether the evidence is sufficient to support a potential judgment in favor of the opposing party." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.) In light of these principles, we consider if the facts viewed most favorably to the plaintiff would permit a reasonable finder of fact to rule in her favor. (*Id*. at p. 841.)

In this legal context, it is normally for the trier of fact to determine when the client-plaintiff was actually harmed, and whether the harm was a consequence of the attorney-defendant's negligence. (*Adams, supra*, 11 Cal.4th 583, 591-592.) "Of course, if the facts are undisputed, the trial court can resolve the question as a matter of law in accordance with the general principles governing summary judgment." (*Ibid*.; *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 ["While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper."]; *Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 32 (*Cleveland*).)

II

LEGAL MALPRACTICE AND ACTUAL INJURY REQUIREMENT

A. Applicable Legal Principles

To prove professional negligence against an attorney, the former client must satisfy these elements: (1) the professional had a duty to use such skill, prudence and diligence as other members of the profession commonly exercise; (2) the defendant breached the duty, failing to meet this standard of conduct; (3) there was causation between negligence and claimed loss or injury; and (4) actual loss or damage resulted from professional negligence. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 (*Budd*), superseded by statute, as stated in *Laird, supra*, 2 Cal. 4th 606.)

A plaintiff's discovery (actual or constructive) of the defendant's alleged wrongful conduct is not an element of a cause of action for legal malpractice, but an untimely discovery of injury can be pleaded as an affirmative defense to a claim of malpractice. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 7-8.) Although section 340.6 specifies that the limitations period begins to run upon the plaintiff's discovery of such facts as will show the defending attorney acted wrongfully (or ability to discover), the section further provides for tolling of that time period until actual injury is sustained. (§ 340.6, subd. (a)(1).)

In the briefing as originally presented to us, the parties discussed the limitations issues mainly in terms of a generic delayed discovery rule, regarding when Sommer's cause of action accrued and the statute of limitations began to run. In *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803, a personal injury and medical malpractice case, the court identified that time of accrual as the point "when the plaintiff has reason to suspect an injury and some wrongful cause."

Legal malpractice actions, however, incorporate more specialized limitations provisions, as definitively decided in *Jordache, supra*, 18 Cal.4th at page 764. We requested and received supplemental briefing on the effect of the one-year limitations period imposed under section 340.6, subdivision (a)(1). The question of whether the former client has suffered actual injury at any particular point, attributable to the breach of a professional duty by the attorney, may be decided "entirely aside from the discovery rule." (*Cleveland, supra,* 171 Cal.App.4th 24, 32.) The reason is that the facts justifying

a finding of constructive notice of wrongdoing by the defendant must also include the plaintiff's ability to plead, upon such facts, that damage has been incurred from the alleged malpractice. An injury requires a wrongful cause for the loss, and the client is not wronged until there is an injury in fact, that is not contingent or speculative in nature. (*Id*. at p. 32; *Jordache, supra*, 18 Cal.4th 739, 749-751.)[8]

We next address whether triable issues of fact exist regarding (1) when Sommer knew or should have known of the facts that constituted Brave's wrongful act or omission against her interests; (2) whether determination of actual injury ("the fact of damage") is predominantly a factual inquiry under these circumstances; and (3) when Sommer suffered "any loss or injury legally cognizable as damages in a legal malpractice action based on the acts or omissions." (*Jordache, supra*, 18 Cal.4th 739, 743, 751, 762.)[9]

Whether attorneys have breached professional duties turns upon whether the legal work was "so legally deficient when it was given that they 'may be found to have failed to use "such skill," prudence, and diligence as lawyers of ordinary skill and capacity

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8 Section 340.6, subdivision (a)(1) requires a malpractice action to be commenced within one year after discovery (or ability to discover), the facts constituting the wrongful act or omission, but delays the accrual of a cause of action until actual injury is sustained. (*Jordache, supra*, 18 Cal.4th at p. 764.) "Ascertaining when the injury occurred can involve resolving a factual dispute." (Mallen & Smith, *supra*, § 23:11, p. 426.)

9 Although Brave contends that Sommer has raised new theories on appeal that were not before the trial court, or that she relies on evidence that was excluded, we decline to resolve this case upon such procedural objections, which are not particularly well taken. Rather, this record adequately presents the limited issues of law to be resolved, because the relevant limitations issues were placed squarely before the trial court, and also before this court, in the supplemental briefing.

commonly possess and exercise in the performance of the tasks which they undertake.' " (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 561.) Applying these rules to this record requires some understanding of quitclaim deed principles and an awareness of the sequence of events and relationships in the transactions.

B. Relevance of Real Property Transactions

It is not disputed that Gloria had the power to sever her joint tenancy interest in the property with Moser and convey it to herself or another. Civil Code section 683.2, subdivision (a) allows a joint tenant, without the joinder or consent of other joint tenants, to sever her interest in a joint tenancy in real property in several ways, by preparing documents showing there was an intent to sever the joint tenancy (such as a deed that names the joint tenant as transferee). (See 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 61, p. 110, citing Civil Code, § 683.2, subd. (a)(1), (2).) "These means of severance are in addition to any other methods by which a joint tenancy may be severed." (12 Witkin, Summary of Cal. Law, *supra,* at p. 110.)

Sommer contends the trial court erred in relying on the provisions of Civil Code section 1207, to find she must have been on constructive notice of all the terms and effect of the recorded quitclaim deed after one year, notwithstanding any defects in the execution of the instrument.[10] The trial court reasoned that Sommer understood that her

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10 Civil Code section 1207 provides in relevant part, "Any instrument affecting the title to real property, one year after the same has been copied into the proper book of record, kept in the office of any county recorder, imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or

claims were founded upon the quitclaim deed, she had actual and constructive notice of its terms and its recording, and therefore she must have had early notice of her injury and its cause, a defective deed, within the meaning of this section.

Civil Code section 1207 is commonly interpreted as providing that even a defective acknowledgment of a deed "cures itself by recordation, after 1 year." (12 Witkin, Summary of Cal. Law, *supra*, § 284, p. 341.) But here, the claim is not that the acknowledgment or format of the deed was defective, but that its substantive content and provisions were substandard, allegedly due to Brave's legal malpractice. We next seek to identify the various junctures in the transactions at which Brave's actions arguably created in Sommer an actual injury, that was redressable in "a present cause of action for any compensable damage." (Mallen & Smith, *supra*, § 23:11, p. 412.)

C. Actual Injury Criteria

Both in *Adams, supra,*11 Cal.4th 583 at pages 588 to 591, and in *Jordache, supra,* 18 Cal.4th 739 at page 743, the Supreme Court emphasized that the running of the applicable statutory time period under section 340.6 will begin when the fact of a plaintiff's damage from legal malpractice can be established. (See *Budd, supra*, 6 Cal.3d at p. 201; *Laird, supra,* 2 Cal.4th at p. 625.) "[T]here are no short cut 'bright line' rules for determining actual injury under section 340.6. [Citations.] Instead, actual injury

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informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein affects the rights of purchasers or encumbrancers previous to the taking effect of this act."

issues require examination of the particular facts of each case in light of the alleged wrongful act or omission." (*Jordache, supra,* at p. 761, fn. 9.)

In Mallen & Smith, the authors state that "judicial confusion and inconsistency" have resulted from "concern about the amount of damage or its apparent actuality. Discovery of injury, however, is different from knowledge of injury. Whether a lawyer has erred or the client has suffered injuries are factors that typically are litigated in a legal malpractice action. . . . [I]f other jurisdictional considerations do not alter the analysis, the simplest, logical and pragmatic approach is to ask whether the attorney's alleged error created a present cause of action for any compensable damage. If the client has a remedy upon which to sue, the statute of limitations should commence." (Mallen & Smith, *supra,* § 23:11, pp. 411-412, fns. omitted.)

In the above analysis, it is not determinative that the fact of damage can be established, while its extent remains uncertain. "The loss of a right, remedy or property interest, or the imposition of a liability is the injury, though the measure of the damages depends on a contingent event. Thus, a defect in title causes the loss of a property interest at the time of the error, but the fact and extent of the damage may be discovered only when the title is challenged. A client who is aware of the defect has a viable legal malpractice action, though there is no adverse claimant." (Mallen & Smith, *supra,* § 23:12, p. 437; fn. omitted.)

The courts utilize various terms to identify when such "actual injury" is sustained, thus putting a stop to any suspension or tolling period that might otherwise have applied. (§ 340.6, subd. (a)(1).) These include such situations as:

1. A client suffers some "appreciable and actual" damage as a result of the attorney's allegedly negligent act(s), such as the " 'impairment or diminution, as well as the total loss or extinction, of a right or remedy.' " (*Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 41; *Jordache, supra*, 18 Cal.4th at p. 750.) The character of the injury must be "manifest and palpable." (*Adams, supra,* 11 Cal.4th 583, 589.) It cannot be "speculative or inchoate," despite difficulty of proof or unknown amount. (*Id.* at p. 590.)

2. A client is injured by altering his or her legal position, such as by entering into a contract that creates an obligation, and doing so in reliance on the attorney's negligent advice. (*Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1168, 1175; *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 108 (*Truong*) [plaintiff-client lost litigation that was based upon lease provisions that the defendant attorney negligently advised it to sign]; *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 951 ["a party's alteration of its legal position in reliance on its counsel can constitute actual injury even though the party may be able to avoid or reduce the injury through subsequent legal action"].)

3. A client incurs actual loss due to the actions or inactions of the attorney, and this loss is not contingent, nor speculative, nor does it represent only a potential of future

harm. (*Adams, supra*, 11 Cal.4th 583, 590; *Heyer, supra*, 70 Cal.2d 223 [an intended beneficiary of the client, an heir, could not sue the client's attorney for professional negligence in preparing a will, until the beneficiary would have had a right to inherit upon the death of the client, but could not do so due to the professional negligence].)

4. Even where the attorney's actions resulted in some kind of potential, contingent or speculative harm, such harm can become actualized injury at some point, without any required "form of final adjudication, as by judgment or settlement. ' "[A]n injury does not disappear or become suspended because a more final adjudication of the result is sought." [Citation.]' " (*Laird, supra*, 2 Cal.4th at p. 615; *Adams, supra*, 11 Cal.4th at p. 591, fn. omitted.) The discovery provisions of section 340.6 may be taken into account in determining whether the client's actual injury, from attorney malpractice, has arisen "at some point short of an adverse judgment or settlement . . . depending upon the facts." (*Adams, supra*, at p. 592.)

5. Actual injury may consist of the cost of a lost opportunity (e.g., a missed development or property right due to passage of time; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217 (*Foxborough*) [lost right to annex a parcel of property due to undisclosed regulatory time bar].) Actual injury may also consist of expenses to the client who is compelled to incur and pay attorney's fees and legal costs and expenditures, in seeking to correct the result of the malpractice. (*Truong, supra*, 181 Cal.App.4th 102, 114; *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457, 1470 [where the transaction that was the purpose of a lawyer's retention was intended to "place the client

and his or her intended beneficiaries in a posture of quiet ownership of assets, [but] the lawyer [acts] negligently [], the mere fact of such [costly resulting] litigation is the unwanted consequence," constituting damage to the client; italics omitted]; *Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 575 (*Callahan*).)

III

ANALYSIS

Generally, "[i]t would be for the trier of fact to determine when the requisite harm actually did occur as a consequence of the attorney's negligence. [Citations.] Of course, if the facts are undisputed, the trial court can resolve the question as a matter of law in accordance with the general principles governing summary judgment." (*Adams*, *supra*, 11 Cal.4th 583, 591-592.)

Here, several considerations must be included in deciding whether triable issues of fact remain as to whether and when actual injury was sustained: (a) the nature of the quitclaim deed transaction, (b) when loss attributable to it became actual and not contingent, viewed in light of the nature and stages of the dispute between Sommer and Moser. It is interesting to note that Brave continues to contend that the quitclaim deed was not defective, or no judicial finding has determined that it was (because of the probate settlement). It is not now before us whether Brave's representation of Gloria and the intended beneficiary, Sommer, in the quitclaim deed portion of the transaction met the applicable standard of care. We are only examining the limitations question on a given set of facts.

A. Nature of Quitclaim Deed Transaction

The trial court reasoned that Sommer knew her ownership interest in the property was predicated on the quitclaim deed, of which she had a copy. She reviewed records at the county recorder's office, knew of Moser's lack of cooperation with her, and talked to Gloria's attorneys, Brave and Ladner, about her interests. Sommer heard from Moser's attorney Stein that "she may not own half the property" as of January 2007. In March 2008, Moser's friend told her that the change of title was not valid. All these facts show that Sommer knew the deed transaction was not going smoothly, but different inferences from the facts can be drawn about why that was so. (*Binder, supra*, 75 Cal.App.4th 832, 840-841.) Even though Sommer knew Brave had prepared a quitclaim deed for a certain purpose, and she could see what the face of the deed said, different inferences are possible about whether she, as a layperson, necessarily understood its contents, or whether its contents were defective due to legal malpractice by Brave, if indeed that turns out to be the case. (See Mallen & Smith, *supra*, § 23:12, pp. 437, 449-450 [awareness of defect can stop tolling].)

The authors of 5 Miller & Starr, California Real Estate (3d ed. 2000) section 11:60, page 11-196, explain the effect of Civil Code section 1207: "If the instrument is recorded despite a missing or defective acknowledgment, however, it will impart constructive notice after a period of one year even if not corrected." (Fn. omitted.) For illustration, in *Osterberg v. Osterberg* (1945) 68 Cal.App.2d 254, 261-264, the face of a deed naming a grantee/son was altered (after signing, but before recording) to reserve a

life estate in favor of the grantor/father. On appeal of judgment for the grantee/son, it was held that the later claimant (surviving wife of the grantor/father) effectively had notice of the contents of the recorded deed after one year's time of the recording, notwithstanding any informality, alteration or defect in it. Our case is distinguishable. The mere recording of the quitclaim deed was not dispositive because it is not obvious on the face of this deed that any interest of the claimant-daughter (a third party) was being changed or interfered with, when the grantor/mother severed the joint tenancy by naming herself and the stepfather/husband as tenants in common. Other legal interpretation is necessary, and remains in dispute here, about the effect on Sommer.

The type of knowledge that Sommer had from the act of recording the deed is confined to the deed's contents, and recording did not change or encompass its merits or validity. By comparison, if a document is void, recording does not convert it into a binding instrument, "simply because it was recorded." (*Taormina Theosophical Community, Inc. v. Silver* (1983) 140 Cal.App.3d 964, 971.) "The purpose of recording is to protect innocent purchasers and encumbrancers of property by giving notice of potential limitations on title. [Citation.] Recording itself grants no interest in the property [citation], and a void document 'derives no validity from the mere fact that it is recorded.' [Citation.]" (*Ibid.*) Where property interest owners are misled by recorded documents about any limitations upon their interests, then "equity might require enforcement of the provisions despite their invalidity," but this is rare. (*Ibid.*) The state

of the record title and the contents of the recorded instrument are considered separately. (*Ibid.*)

We cannot conclude that the recording of this quitclaim deed necessarily gave constructive notice of any problems with its contents or provisions, that were possibly attributable to Brave's defective preparation or substance of the deed. Reliance on Civil Code section 1207 as giving constructive notice begs the relevant questions, such as (1) what notice was given of what interest that was actually transferred, and was the transfer in compliance with Gloria's wishes and instructions to Brave, (2) when did the quitclaim deed's existence actually alter Sommer's legal position, in the absence of any further transfer of title or possession of the property, or other event that served to fix the time and amount of actual injury, and (3) did Sommer act as a reasonable layperson in investigating the quitclaim deed transactions and Moser's reasons for resistance to her position?

Here, the running of the limitations period could have been triggered if a sale of the property took place, from which proceeds would be divided, and then, any "actual injury" would no longer be contingent or speculative, and could then be attributed to Brave's alleged negligence. The nature of this quitclaim deed transaction, followed up by the trust transaction, did not directly bring matters to a head in the same way that a sale of the property or a partition action would have done. In other words, Brave's activities on behalf of Gloria, in merely severing a joint tenancy interest, with the anticipated transfer to a trust and then to Sommer, in some sense remained paper transactions that might or

might not create any real world implications, such as receipt of rents/profits or payment of property taxes. Different inferences can be drawn about the type of knowledge that was gained by Sommer, and when, upon her investigation of the recorded title status and her informal communications with Gloria's attorneys, as well as Moser's representatives, about her interests.

B. Nature of Dispute and Proceedings

After Gloria died in January 2007, Moser's attorney Stein told Sommer that she may not own a half interest in the property. In response, Sommer continued to communicate with Gloria's attorneys into 2008, and inferences can be drawn about whether it was reasonable for her to think that things could still be straightened out in her favor, or to believe there might be other reasons for Moser's lack of cooperation with her (such as locking her out of the property). Ladner told Sommer that if the deed prepared by Brave was accurately prepared from the most current prior deed, it should be fine, but Ladner said she had not seen the previous deed, and it is unclear whether Sommer could reasonably still have been left in doubt about whether Gloria's wishes had been followed properly. These are triable issues of fact on the tolling issue.

In March 2008, Sommer was again told by a friend of Moser that Gloria's transaction might not have been valid. Apparently in September 2008, she discovered Moser had written a new trust and will, and those events could have further altered the legal position that she was placed in by Brave's professional activities. (*Jordache, supra,* 18 Cal.4th at p. 754.)

Shortly thereafter, in October 2008, Sommer engaged a probate attorney to pursue her property interest. In March 2009, the probate attorney obtained a declaration from Brave in support of Sommer's position, then filed the action and ultimately settled it.

In some cases, entry into a contract can mark the time of actual injury, such as in *Hensley v. Caietti, supra,* 13 Cal.App.4th 1165, where malpractice injury to the client was held to be created when she signed an unfavorable marital settlement agreement, based on the advice of her counsel (not later when judgment issued on the agreement). (*Id*. at pp. 1168, 1175 ["Entering a contract is a jural act which alters the legal relations of the parties and creates an obligation"], see Mallen & Smith, *supra,* § 23:12, p. 444.) Here, it was Gloria who was the client who requested and carried out the quitclaim deed transaction, not Sommer, and it is not yet clear when and whether Sommer sustained actual injury from the execution of the quitclaim deed, since further trust transactions had to be carried out, along with other contingencies, before Sommer could benefit from an interest in the property.

Because actual injury can be incurred prior to a judgment date regarding a particular dispute, the settlement of the probate action (well after Jan. 2009) does not appear particularly relevant here. (*Adams, supra,* 11 Cal.4th at pp. 591-592.) That settlement merely followed up on legally cognizable damage, but it is still unclear when the loss became identifiable. (*Truong, supra,* 181 Cal.App.4th 102, 113-115.) There was no transfer of possession of property or other event that had taken place to clearly fix the time and amount of actual injury, or to enable identification of wrongdoing, to start the

statutory limitations period running. (§ 340.6, subd. (a)(1); *Foxborough, supra,* 26 Cal.App.4th at p. 227.)

From this sequence of events, different inferences can be drawn about the types of knowledge that Sommer had, over time, about the source of problems with her interest in the property, and also about when she was financially injured, in such a way as to constitute any potential legal malpractice damages. Based on Gloria's instructions to Brave, Sommer had an expectancy of inheriting a portion of the property, but Sommer apparently knew that Moser intended to continue to live in it for the immediate future, and until September 2008 she thought she was still one of his heirs. There is no evidence about whether a transfer was contemplated earlier, possibly giving her some contingent right to receive a share of the proceeds, or altering her legal position, or affecting the permanency of actual injury. (*Foxborough, supra,* 26 Cal.App.4th at p. 227; *Callahan, supra,* 194 Cal.App.4th 557, 575.)

Under the various definitions of actual injury described above, we cannot conclude that summary judgment was proper against Sommer on the grounds that her complaint was time-barred. Arguably, there are several points at which the running of the limitations period could have been triggered here, by the suffering of "actual injury" that was not contingent or speculative, as a result of Brave's alleged negligence in preparing the deed. However, Sommer's complaint alleges her discovery of her injury occurred in October of 2008, and currently, there is no reason to accept her belated contention in the briefs that her actual injury was not incurred until January 2009, when Moser's attorney

communicated with Sommer's probate counsel, to contest her claim in a letter. By that time, Sommer had already recognized the situation was problematic and had taken steps to protect her interest in probate court, and the record does not show that any appropriate leave to amend these pleadings has been sought to support a later discovery date. (See fn. 4, *ante*.)

In any case, each of the other disputed dates should be evaluated in terms of how they showed Sommer's actual or constructive knowledge of the facts that constituted a loss that was directly attributable to wrongful acts or omissions by Brave, not by someone else. That recognition required some legal knowledge about recorded deeds, and even now, the parties are arguing about whether Brave's legal representation was substandard in preparing the quitclaim deed.

Under a proper interpretation of statutory tolling principles for determining the time Sommer sustained "actual injury," triable issues of material fact remain about when she suffered or became aware of "any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions." (*Jordache, supra,* 18 Cal.4th 739, 743, 751, 762.) "[A]ctual injury issues require examination of the particular facts of each case in light of the alleged wrongful act or omission." (*Id.* at p. 761, fn. 9.) The trial court erroneously granted summary judgment on limitations grounds. (§ 340.6, subd. (a)(1).) We need not address the remaining arguments on appeal.

DISPOSITION

Summary judgment is reversed with directions to the trial court to enter a new order denying the motion. Appellant shall recover her costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.